Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club *and* Donald Schimizzi.

Service Employees International Union, Local No. 18, AFL-CIO *and* Donald Schimizzi. Cases 32-CA-2884 and 32-CB-799

March 22, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 17, 1981, Administrative Law Judge Michael D. Stevenson issued the attached Decision in this proceeding. Thereafter, Service Employees International Union No. 18, AFL-CIO (herein the Union), and Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club (herein the Employer) filed exceptions and supporting briefs. The General Counsel then filed a brief in support of the Administrative Law Judge's Decision and the Charging Party filed a brief in answer to the exceptions filed by the Union and the Employer.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, Oakland, California, its officers, agents, successors, and assigns, and Respondent, Service Employees International Union, Local No. 18, AFL-CIO, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notices are substituted for those of the Administrative Law Judge.

MEMBER JENKINS, dissenting in part:

I agree with my colleagues that Respondent Union and Respondent Employer violated the Act by their actions taken against employee Donald Schimizzi in February 1980, and that each Respondent should be ordered to remedy the violations found in this proceeding. Contrary to my colleagues, however, I would not terminate Respondent Union's backpay liability 5 days after its notification to Respondent Employer and Donald Schimizzi that it has no objection to Schimizzi's employment.

The Board has held that "the proper and effective realization of statutory policy . . . requires that a transgressor should bear the burden of the consequences stemming from its illegal acts."[4] My majority colleagues do not dispute that Respondent Union unlawfully caused Schimizzi's discharge. Indeed, it cannot be gainsaid that Respondent Union set in motion the chain of events, and was the motivating force, that led to Schmizzi's discharge.

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[1] The Union also filed a motion to reopen the record for the purpose of completing an exhibit. There was no opposition to this motion. It therefore is granted for the express purpose of accepting p. 2 of the collective-bargaining agreement, G.C. Exh. 2, which was inadvertently omitted at the hearing.

[2] The Administrative Law Judge's remedy and recommended Order correctly require Respondent Union and Respondent Employer to jointly and severally make Schimizzi whole for any loss of earnings incurred as a result of their unlawful conduct. Also, the recommended Order correctly requires Respondent Union to notify Schimizzi and Respondent Employer that it no longer objects to Schimizzi's employment. However, the Administrative Law Judge failed to state that Respondent Union's backpay liability shall terminate 5 days after it gives the required notification to Respondent Employer and Schimizzi. Respondent Employer shall terminate its backpay liability on the date it offers Schimizzi reemployment.

For the reasons fully set forth in *C. B. Display Service, Inc.*, 260 NLRB 1102 (1982), we cannot agree with our dissenting colleague that the remedy prescribed in *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981), is applicable in the circumstances of this case. See also *Q.V.L. Construction, Inc.*, 260 NLRB 1096 (1982). Further, we cannot agree that *Jimmy Kilgore Trucking Company*, 254 NLRB 935 (1981)—cited by our colleague—lends support to his position. In *Jimmy Kilgore*, an employer that discharged an employee was neither joined as a party in the case nor found to be culpable in any respect for the employee's discharge. Rather, the respondent employer was found to have unlawfully caused the nonrespondent employer to discharge the employee. Significantly, in *Jimmy Kilgore*, as in *Zinsco*, there was only one transgressor and that party was properly held fully responsible for remedying its unfair labor practices. Here, unlike *Jimmy Kilgore* and *Zinsco*, two parties have been found to have committed unfair labor practices. Respondent Employer, with the power and authority to offer reinstatement to the discriminatee, has been found culpable, along with Respondent Union, for the discriminatory discharge of Schimizzi. Accordingly, under these circumstances, Respondent Union may properly end its backpay liability 5 days after it notifies Respondent Employer and Schimizzi that it has no objection to the employment of Schimizzi.

Respondent Union has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Further, as the Administrative Law Judge credited Charging Party Schimizzi's version of the events, it is unnecessary to rely on the Administrative Law Judge's comments contained in fn. 6 of his Decision.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[4] *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981).

Despite Respondent Union's clear violation of the Act, my colleagues allow Respondent Union to limit its backpay liability simply by giving notice to the Employer that it has no objection to Schimizzi's hire. Unlike my colleagues, I would not toll Respondent Union's liability for backpay 5 days after tendering appropriate notice, but thereafter would hold it secondarily liable to remedy the illegal action.[5] The effect of continuing to hold liable the party that caused the discriminatory conduct, albeit secondarily liable after the appropriate notices, will assure to the fullest possible extent that the injured employee will be made whole.[6] In all other respects, I agree with my colleagues' decision.

[5] See my partial dissenting opinions in *C. B. Display Service, Inc.*, 260 NLRB 1102; and *Q.V.L. Construction, Inc.*, 260 NLRB 1096 (1982).

[6] It was this same purpose, to assure to the fullest possible extent that the injured employee will be made whole, that underpins the Board's decision in *Zinsco Electrical Products, supra*. See also *Jimmy Kilgore Trucking Company*, 254 NLRB 935 (1981), where the Board did not accept the Administrative Law Judge's proposed remedy to the extent that it limited the respondent's backpay liability to a period prior to the date respondent notified dischargee Smith's former employer that it had no objection to the latter's employment of Smith. Instead, the Board required the respondent to make whole Smith for all losses of wages and benefits suffered by him as a result of the respondent's unlawful action until Smith either was reinstated to his former or substantially equivalent position or until he obtained substantially equivalent employment elsewhere.

Thus Respondent Union here is like the respondent employer in *Jimmy Kilgore* because each caused the discriminatory conduct but neither was itself the employer of the discriminatee and, hence, in a position to return the discriminatee to his "former position." By holding Respondent Union *secondarily* liable after it tenders appropriate notices, the ultimate responsibility for making the victim whole will be placed on the party that caused the discriminatory conduct, fully in cases with a single transgressor and secondarily in cases with another named respondent who fails to satisfy its obligations under a Board order. There is no compelling reason in logic or policy for differentiating such cases since in both types the party that caused the discriminatory conduct becomes responsible for the obligation occurring after the 5-day notice *only* because the discriminatee would not otherwise be made whole. In sum, like Smith in *Jimmy Kilgore*, Schimizzi "will be assured of being made whole to the fullest possible extent."

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT encourage your membership in Service Employees Union, Local No. 18, AFL-CIO, or in any other labor organization, by discriminating in regard to your hire or tenure of employment or any term or condition of employment except to the extent permitted by the proviso to Section 8(a)(3) of the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

WE WILL offer Donald Schimizzi immediate and full reinstatement to his former job or, if such job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings he may have suffered by reason of the discrimination against him as a result of his discharge on February 22, 1980, to the date we offer him reinstatement and will, jointly and severally with Service Employees International Union, Local No. 18, AFL-CIO, reimburse him with interest for any loss of earnings suffered as a result of the discrimination practiced against him.

HARSH INVESTMENT CORPORATION
D/B/A THE CLAREMONT RESORT
HOTEL AND TENNIS CLUB

APPENDIX B

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT fail to give reasonable advance notice to our members that they are about to become delinquent in their dues and our notice to such members shall contain the following:

1. The amount of dues owed.
2. The months for which dues are owed and the method of calculating the impending dues delinquency.
3. The last day upon which the specified amounts can be paid to the Union.

WE WILL NOT fail to carry out our fiduciary responsibility to our members by failing to give them reasonable notice of their dues delinquency which would authorize us to require any company to terminate them under the union-security provision of our collective-bargaining agreement with the affected company.

WE WILL NOT fail in our fiduciary responsibility to our members by implementing the union-security provision of our contract with any company in an arbitrary and capricious way so as to lead to the termination of our

members of their loss of employment, seniority, or other rights and privileges.

WE WILL NOT cause or attempt to cause Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club to discriminate against Donald Schimizzi, or any other employee, in violation of Section 8(a)(3) of the Act.

WE WILL notify Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, if we have not already done so, in writing, that we withdraw all our objections to the Company employing Donald Schimizzi, and in the letter we shall request his full reinstatement and the restoration of his full seniority rights and other rights and privileges as though his employment and recall rights had never been interrupted.

WE WILL jointly and severally with the above-named Employer make Donald Schimizzi whole for any loss of pay suffered by him because of the discrimination against him, with interest.

WE WILL NOT in any like or related manner restrain or coerce employees inthe exercise of the rights guaranteed them in Section 7 of the Act, except to the extent that such rights may be affected by our lawful application and implementation of an agreement requiring membership in a labor organization as a condition of employment.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 18, AFL-CIO

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge: This case was heard before me at Oakland, California, on March 3, 1981,[1] pursuant to an order consolidating cases, consolidated complaint, and notice of hearing issued by the Regional Director for the National Labor Relations Board for Region 32 on August 29, based on a charge filed by Donald Schimizzi (herein called Schimizzi or sometimes Charging Party) on July 18. The complaint alleges that Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club and Service Employees International Union, Local No. 18, AFL-CIO (herein called the Employer and the Union, respectively), have engaged in certain violations of Sections 8(a)(1) and (3) (as to Employer) and 8(b)(2) and (1)(A) (as to Union) of the National Labor Relations Act, as amended (herein called the Act).

[1] All dates herein refer to 1980 unless otherwise indicated.

ISSUES

Whether Schimizzi was discharged by the Employer upon the Union's demand because Schimizzi failed to make timely payment of union dues and other fees, and, if so, whether one or both Respondents violated the Act under the facts and circumstances of this case.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Employer, and the Union.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent Employer admits that it is an Oregon corporation which operates a hotel located in Oakland, California. It further admits that during the past year, in the course and conduct of its business, its gross volume exceeded $500,000 and that annually it purchases and receives goods and materials valued in excess of $5,000 from suppliers located outside the State of California. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent Union admits, and I find, that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Employer and the Union had a collective-bargaining agreement effective from June 1977 through May. One provision of this contract requires that bargaining unit employees shall, not later than the 31st day following the beginning of each employee's employment join the Union and remain members in good standing. (G.C. Exh. 2.)[2] Schimizzi began his employment at the Claremont on August 1, 1979, as a houseman or janitor. His work was satisfactory and he continued his employment on a steady basis until his discharge on February 22.

Pursuant to the collective-bargaining agreement, Schimizzi joined the Union shortly after he began employment. He paid a $60 initiation fee and then paid monthly dues of $9 on a regular basis through and including November 1979.[3] Due to serious family illness, Schimizzi

[2] A portion of G.C. Exh. 2, i.e., p. 2, appears to be missing although there was no claim at hearing it was incomplete. Its absence from the exhibits cannot be accounted for.

[3] In its brief, the Union inadvertently states, that "the last time on which Schimizzi paid dues was February 27, 1979."

did not pay his December 1979 nor his January dues. The Employer agreed to permit Schimizzi a 2-week leave of absence to attend to this illness out of State. He returned on January 3.

Union bylaws articles VI, section 5-8, deal with the payment of union dues and fees and the results of a failure to keep current:

LOCAL 18—SEIU, AFL-CIO

Sec. 5. Any member failing to pay dues and assessments of the Local Union on or before the last day of the month in which the same are due, shall stand automatically suspended from membership in this Local Union, and from all rights and privileges of such membership. Any suspended member may be readmitted to membership within sixty (60) days after automatic suspension upon payment of back and current dues, but in no event shall such readmission restore any privileges, death gratuities or other benefits. Any member who has been in suspension for a period greater than sixty (60) days can be readmitted upon the payment of a readmission fee of fifteen dollars ($15.00), in addition to the amount of dues, fines, and assessments owed, but in no event shall such readmission restore any privileges, death gratuities or other benefits.

Sec. 6. All members of the Local Union are under a positive duty to see that their dues are paid on or before the last day of the month in which the same are due at the office of the Local Union.

Sec. 7. The failure of a steward or any officer of the Local Union to appear or to collect the dues shall not in any manner excuse the member from his obligations to pay his dues on or before their due date at the office of the Local Union.

Sec. 8. A suspended member who pays up his back dues and assessments shall, from the date of such payment, be considered the same as a new member. [G.C. Exh. 6.]

Thus by February, Schimizzi owed his dues for 2 months and a $15 readmission fee.[4] On February 11, the Union sent Schimizzi notice that he owed $42 and further notice that such amount must be paid "on or before 2-18-80, or [you will be] removed from your job." (G.C. Exh. 5.) This notice was sent to 442 37th Street, Oakland, California, an address that Schimizzi had moved from on January 8. Schimizzi did not notify the Union of his new address, but he did leave a change of address form with his former post office. Notwithstanding the change of address form, the post office delivered the form to Schimizzi's old address. There the new occupant gave it to a friend of Schimizzi's who finally gave it to him on Sunday, February 17. Before continuing this chronology, it is necessary to return to the date of February 11.

On that date of February 11, Schimizzi obtained a money order for $27 from a local savings and loan. He testified that he mailed it in a properly addressed envelope to the Union's business office in Oakland and I credit his testimony.[5] No record of the Union indicates when it was received in their office since the $27 was considered a partial payment which was not recorded on Schimizzi's payment record pursuant to longstanding policy against acceptance of partial payment. No attempt was made to reach Schimizzi to inform him he was still subject to loss of employment. Schimizzi testified that he was never told of the $15 readmission fee nor was he ever given a copy of the Union's bylaws. There is no evidence to the contrary and I credit his testimony.

Returning then to February 17, the date of Schimizzi's first knowledge that he was still delinquent in his union dues, I note that he attempted to reach a union official on February 18, but due to Washington's Birthday, a union-recognized holiday, he was unable to do so. Finally, on February 19, a Tuesday, Schimizzi reached Charles Garner, president of Local 18, at the union office by telephone.

The contents of the telephone conversation are disputed by the parties. According to Garner, Schimizzi told him that he did not have enough money to pay all that was due. Garner told him to get the money and drop it in the mail slot of the business office before the start of business on the next day. If this were done, the Union would call the employer and Schimizzi would not lose his job. Garner denied that Schimizzi stated that he had already mailed in his $27 and Garner denied that he otherwise knew this. No records of the Union indicate whether the $27 had been received by then.

According to Schimizzi, he told Garner that he had just received a copy of the suspension notice on February 17 and he explained the problem with his change of address. He further told Garner that he had sent the $27 payment on February 11. Then Garner asked him to bring in $15 right then. Schimizzi explained that he was then on a lunch break at work, did not own a car, and asked whether it would be all right to mail in the payment. Garner said that, if he mailed the $15 then, it would be all right. Acting on Garner's statement, Schimizzi purchased a $15 money order at the same place as before and mailed it to the Union.

I credit Schimizzi's version of events. First, Garner testified that his local had 2,300 members and that he received numerous phone calls daily from members about different matters. He made no notation of the conversation and his recollection was not as good as Schimizzi's. Furthermore, while Schimizzi would have found it difficult to get to the union office then, was off for the next 2 days and, had he not believed that Garner would permit him to mail the payment, he undoubtedly would have gone to the union office the next day or even at the end of that day's shift since he apparently worked 7 a.m. to 3:30 p.m. Furthermore, I do not believe that Schimizzi would not have mentioned that he had mailed in 3 months' dues about a week before.[6]

[4] With the February payment, not due until the end of the month, Schimizzi owed $42.

[5] No reason was suggested why Schimizzi would get the money order on February 11, but not mail it immediately. He had every reason to mail it immediately and the Union's evidence is entirely consistent with a mailing on the February 11.

[6] By crediting Schimizzi, I find only that he understood and believed Garner to have said that putting the payment in the mailbox was accept-

Continued

When the Union mailed out the February 11 suspension notice, discussed above, a copy was sent to the Employer. It was received by Emily Graham, the Employer's personnel director at that time. Routinely, she informed Patricia Didlake, the Employer's executive housekeeper and Schimizzi's immediate supervisor. Schimizzi was off on February 20 and 21 and he was due to begin at 7 a.m. on February 22. Since Didlake did not report for work until 8:30 a.m., she pulled Schimizzi's timecard before she left for home on February 21.

At 7 a.m. on February 22, Schimizzi reported for work and found his timecard missing. For 90 minutes he waited for Didlake to appear. When she did, he was told he was being terminated for nonpayment of union dues. Schimizzi told her that he had "cleared the matter with the Union" and paid his dues, but Didlake told him, while she was sympathetic, there was nothing she could do.

After his discharge, Schimizzi called the union office and talked to Elizabeth LaBarr, business agent for the hotels. LaBarr explained that he was terminated because his entire delinquency had not been cleared up by February 18. There was nothing she could do. At Schimizzi's insistence, LaBarr transferred the call to Garner, who generally reiterated LaBarr's comments.

Shortly after he was terminated, Schimizzi received four receipts in the mail from the Union. These reflect that Schimizzi was paid up for December 1979, January, and February and had paid his $15 late fee. The date of these four receipts was February 21, the day *before* Schimizzi had been fired by Didlake. (G.C. Exh. 10(a–d).)

B. *Analysis and Conclusions*

1. The case against the Union

A union may cause an employee's discharge pursuant to a union-security clause only for "failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[7] However, because of the severe penalties attendant to failure to make timely payment, i.e., loss of employment, the Board and the courts have imposed a kind of procedural due process upon unions so that employees are not subject to needless discharge.

In *United Metaltronics and Hospital Supply Employees, Local 955, (Pharmaseal Laboratories, Inc.)*, 254 NLRB 601, 606 (1981), the Board approved the Administrative Law Judge's statement of law taken from an earlier case:

> In *Chauffeurs, Salesdrivers & Helpers Union, Local 572, IBT (Ralphs Grocery Company)*, 247 NLRB [934, 935 (1980)], the Board summarized the applicable law governing the scope of a union's fiduciary duty to inform employees of their obligations under a valid union-security clause, as follows:
>
> > We find merit in the General Counsel's contention that a "reasonably couched effort" to notify Roy of her membership obligations is not sufficient under Section 8(b)(1)(A) and (2) to satisfy the Union's fiduciary duty to her. In *N.L.R.B.* v. *Hotel, Motel & Club Employees' Union, Local 568, AFL–CIO (Philadephia Sheraton Corp.)*[6] the Third Circuit held that the "minimum" requirement of this duty is to "inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure." In *Teamsters Local Union No. 122 (August A. Busch & Co. of Mass., Inc.)*,[7] the Board specifically [defined] the union's duty as including "a statement of the precise amount and months for which dues were owed, as well as an explanation of the methods used in computing the amount" plus "an adequate opportunity to make payment." In *Chauffeurs, Teamsters and Helpers Local Union 150 et al. (Delta Lines)*,[8] we stressed that inquiries made by an individual as to his to her obligations do not relieve a union of its *affirmative* duty under the Act specifically to inform an individual of his obligations and afford him a reasonable opportunity to satisfy them before seeking his discharge under a union-security clause.

[6] 320 F.2d 254, 258 (1963), enfg. 136 NLRB 888 (1962).

[7] 203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974).

[8] 242 NLRB 454, 455 (1979).

In applying the above statement of law to the facts of the instant case, I find several deficiencies in the Union's actions. First, the February 11 notice was inaccurate because it did not contain a statement of the precise amount and months for which dues were owed. That notice stated that Schimizzi owed $42. Yet, according to Garner, "Monthly dues are payable on or before the last day of each month." Accordingly, as of February 11, Schimizzi owed only $33, not $42. Further, there was no explanation of the methods used in computing the amount. In this respect, I note Schimizzi's testimony that he never received a copy of the Union's constitution and bylaws. In the absence of any evidence that he did or that he was negligent in not receiving it, I credit his testimony which further strengthens his case for lack of proper notice.[8]

Although I find that the Union's notice to Schimizzi was fatally defective,[9] I also note that he was not given an adequate opportunity to make payment. He received the Union's defective notice on February 17. In this respect, I note that Schimizzi had moved to a new address without informing the Union, but he did leave a change of address with the proper U.S. Post Office. The post office did not forward the notice to the new address, but

able. It is not necessary to ascertain whether Garner actually said this. As to the other details of the conversation, I credit Schimizzi's version for the reasons given in the text.

[7] See *N.L.R.B.* v. *General Motors Corporation*, 373 U.S. 734 (1963).

[8] In another context, the Board has held that a union's constitutional provision is not a substitute for proper notice. *International Association of Machinists and Aerospace Workers, District No. 71, Local 778*, 224 NLRB 580 (1976).

[9] *N.L.R.B.* v. *Local 1445, United Food and Commercial Workers International Union, AFL–CIO [Gallahue's Supermarkets]*, 647 F.2d 214 (1st Cir. 1981).

misdelivered it to the old address, where a new tenant was then residing. Schimizzi should not be penalized due to the mistake of the post office.[10] Thus, even if I were to credit Garner, the 1-day's notice he testified he gave Schimizzi on February 19 is inadequate and does not comport with the Union's fiduciary duty. Indeed, I have credited Schimizzi's testimony below, that he was either told or understood that he was told that placing the missing $15 in a mailbox was permissible.

For still another reason, I must find that the Union violated the Act as alleged. On February 21, the Union formally accepted Schimizzi's delinquent dues and the readmission fee. Technically, $33 of that money was due on February 18. Because that date was a recognized holiday, the money was due on February 19. I find that, by accepting the money on February 21, including $9 which was not due until the end of February, the Union waived its right to enforce a union-security agreement by requesting the employee to discharge Schimizzi for failure to pay union dues and fees on a timely basis.

In *N.L.R.B.* v. *Brotherhood of Teamsters and Auto Truck Drivers Local 85 [Pacific Motor Trucking Co.]*, 458 F.2d 222, 225 (9th Cir. 1972), the court affirmed in relevant part a Board order holding that where a union had accepted a tender of dues after it had requested an employee's discharge, the union had waived the asserted delinquency as a ground for discharge under the union-security agreement.[11] In this case, I find that the Union accepted two payments from Schimizzi: the first received on or about February 14; the second received on or about February 21. The Union had a policy against acceptance of partial payments, but it neither sent the $27 back nor notified Schimizzi that he owed additional moneys. Accordingly, as of receipt of the first payment, the Union waived its right to enforce the security agreement on this basis as well, as because of the defective notice discussed above, I find it violated the Act by causing Schimizzi's discharge.

For the above-stated reasons, each of which is sufficient by itself to compel a finding that the Union has violated Section 8(b)(2) and (1)(A) of the Act as alleged, I so find.[12]

2. The case against the Employer

While the evidence against the Union is overwhelming, the evidence against the Employer presents a closer case. I begin with the recent case of *Valley Cabinet & Mfg., Inc.*, 253 NLRB 98 (1980), where, in a case similar to that at bar, the Board reversed an Administrative Law Judge's finding that the employer violated Section 8(a)(3) and (1) of the Act by discharging an employee at the union's request. In that case, the Board set forth the applicable statement of law:

> Section 8(a)(3) of the Act makes it an unfair labor practice or an employer to discriminate in regard to hire or tenure of employment to encourage or discourage union membership, but allows an employer to enter into a valid union-security agreement and abide by its terms under the following proviso:
>
> > *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
>
> Thus, an employer is held to a lower standard than the union under this proviso to Section 8(a)(3) of the Act; that is, it violates the Act only when it discharges an employee at the request of the union when it was "reasonable grounds for believing" that the request was unlawful. *Forsyth Hardwood Company*, 243 NLRB 1039, 1040 (1979); *Conductron Corporation, a subsidiary of McDonnell Douglas Corporation*, 183 NLRB 419, 429 (1970).

Applying the law to this case, I am constrained to find that the Employer violated Section 8(a)(1) and (3) of the Act by its termination of Schimizzi. First, Didlake pulled his card on February 21 before she went home, knowing that Schimizzi would have to wait 90 minutes at her office door until she came in to terminate him. Had Didlake called him at home on February 21 to tell him that she had been forced to fire him, then presumably he would have reported the next morning with his money order receipts in hand as proof he had paid the Union. In its brief, the Employer faults Schimizzi for not producing documentation to substantiate his claim. How he would have known, on February 22, to bring these receipts with him is not explained and I find that Schimizzi had no reasonable basis to believe the receipts would be helpful.

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[10] Cf. *District 9, International Association of Machinists and Aerospace Workers, AFL-CIO (Marvel-Schebzer, Division of Borg-Warner Corp.)*, 237 NLRB 1278 (1978).

[11] See also *F. J. Burns Draying, Inc.*, 129 NLRB 252 (1960); compare *Larkins* v. *N.L.R.B.*, 596 F.2d 240 (7th Cir. 1979), where the union accepted a reinstatement fee prior to the employee's discharge, but then returned it within a week's time. The court refused to enforce the Board's order finding the union had violated the Act. In the instant case, the Union never returned the money. While *Larkins* did not enforce a Board order and therefore is not binding on me in any event, it is nevertheless instructive because the case does recognize the general rule on which I rely:

> In the proper circumstances, when a union accepts even a partial tender of this sort after it has requested that the Company discharge the employee, it waives its right to pursue the discharge. [596 F.2d at 247.]

Accordingly, I find that even as early as February 14 when the Union likely received Schimizzi's $27, which had been mailed on February 11, the waiver was effective. It makes no difference that the Union did not immediately apply the partial payment to its books.

[12] In its brief, the Union raises certain matters which are either irrelevant to the case or support the General Counsel's case: as examples of the former, that Schimizzi took a withdrawal from the Union, and that he wrote letters to the Union lacking in literary merit, as examples of the latter, that Schimizzi hired an attorney who demanded from the Union backpay and damages. As to a defense on the merits, the Union cites not a single case and I reject its factual contentions.

For me, however, the case turns on Schimizzi's statements to Didlake on the morning of February 22, that he had cleared the matter with the Union and paid the delinquent fees. In reversing the Administrative Law Judge in *Valley Cabinet & Mfg., Inc., supra*, the Board noted that a crucial element in its decision was the failure of the employee to protest her discharge or to indicate in any other way that the letter requesting her discharge was incorrect. In the instant case, I find that Schimizzi did all that he could to put the Employer on notice that something was amiss. Since Schimizzi's work had been satisfactory, Didlake had no reason to disregard his pleas.

In its brief the Employer argues that:

> Even if The Claremont had attempted to ascertain Schimizzi's status with the Union on February 22, 1980, it would have been faced with exactly the conflicting statements now before the Board. Presumably, the Union president would have maintained . . . that Schimizzi had not paid the full amount before the deadline while Schimizzi would have claimed that he had been granted an extension.

Of course, what the union president might have said, if asked, is idle speculation. However, somebody at the Union undoubtedly would have looked at Schimizzi's record card (G.C. Exh. 3) and discovered that, as of February 21, Schimizzi was up to date on his dues and in good standing with the Union. Undoubtedly, a spirit of concern for its own welfare, if not concern for Schimizzi's would have motiviated the Employer to defer firing Schimizzi until the Union provided additional facts and explanations. Yet the Employer never called the Union. Under the circumstances present herein, it had a duty to make further inquiry of the Union before firing Schimizzi. That is, the Employer had reasonable grounds for believing the Union's request to terminate Schimizzi was unlawful. Because they did not make further inquiry, I am constrained to find that, like the Union, the Employer has violated the Act, as alleged.

CONCLUSIONS OF LAW

1. Respondent Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent Service Employees International Union, Local No. 18, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Union has violated Section 8(b)(1)(A) and (2) of the Act by causing the discharge of employee Donald Schimizzi for nonpayment of dues and readmission fees in a manner which did not satisfy its fiduciary obligation to said employees.

4. Respondent Employer has violated Section 8(a)(1) and (3) of the Act by discharging Donald Schimizzi and thereafter refusing to reinstate him without investigating and/or ascertaining the circumstances underlying the Union's request to discharge him, in the face of reasonable cause to believe such investigation was warranted.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent Employer and Respondent Union have engaged in and are engaging in unfair labor practices within the meaning of the Act, I shall recommend that they cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent Employer unlawfully discharged Donald Schimizzi and unlawfully failed to reinstate him, I shall recommend that Respondent Employer be ordered to offer Schimizzi immediate and full reinstatement to his former position or, if that is no longer in existence, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges.[13]

I further recommend that Respondent Union be required to notify Schimizzi and Respondent Employer that it no longer objects to Schimizzi's employment. I also recommend that Respondent Union and Respondent Employer jointly and severally make Schimizzi whole for any loss of earnings incurred as a result of Respondent's conduct found to be unlawful herein. The loss of earnings shall be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest on the backpay due in accordance with the Board policy set out in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[14]

A. Respondent, Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, Oakland, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Service Employees International Union, Local No. 18, AFL-CIO, or in any other labor organization, by discriminating against employees in regard to their hire or tenure of employment or any term or condition of employment, except to the extent permitted by the proviso to Section 8(a)(3) of the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights

[13] If the Board reverses my findings on the liability of the Employer, then the Union's liability shall be in accord with the Board's holding in *Sheet Metal Workers' Union, Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773, 774 (1981).

[14] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

guaranteed in Section 7 of the amended Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Donald Schimizzi immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent one, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him as a result of being discharged on February 22, in the manner set forth above in the section entitled "The Remedy."

(b) Expunge from its files any and all references to the February 22 discharge or to the Union's claim that Donald Schimizzi was delinquent in payment of union dues and fees.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other data necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(d) Post at its Oakland, California, facility copies of the attached notice marked "Appendix A."[15] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by the Respondent Employer's representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent Employer to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps it has taken to comply herewith.

B. Respondent Service Employees International Union, Local No. 18, AFL-CIO, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Giving effect to, implementing, or in any manner enforcing a practice which fails to accord reasonable notice to members of their dues delinquency, said reasonable oral or written notice to include a statement of the precise amount of dues owed, the month for which said dues are owed, and an explanation of the method used in computing the amount of the dues owed, and which, additionally, accords members an adequate opportunity to pay the amount specificed as owing.

(b) Causing or attempting to cause Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, or any other employer, to discharge or discriminate against employees with respect to their tenure of employment or terms and conditions of employment or to apply the union-security provisions of any collective-bargaining agreement to which the Respondent Union is signatory to employees who have not been accorded reasonable notice of their dues delinquency, or in any arbitrary or capricious manner inconsistent with the fiduciary responsibility owed by it to its members.

(c) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Post at its office and meeting halls copies of the attached notice marked "Appendix."[16] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent Union's official representative, shall be posted immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union and its agents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Forward to the said Regional Director signed copies of Appendix B for posting by Respondent Employer, the Respondent Employer willing, at its Oakland, California, facility for 60 consecutive days, in places where notices to employees are customarily posted.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

(d) Reinstate Donald Schimizzi to the rolls of the Union in good standing, contingent upon payment of prospective union dues on a monthly basis.

(e) Make whole Donald Schimizzi for any loss of earnings he may have suffered because of his unlawful loss of status in his former position of employment by paying to him the sum of money computed in the manner specified in the section of this Decision entitled, "The Remedy."

(f) Notify Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, in writing, with a copy to Donald Schimizzi, if, for any reason, it should be found not to have previously done so, that it rescinds any request or demand which resulted in the termination of his employment. Such written notification, with copy to Schimizzi, shall also advise the Respondent Employer that the Respondent Union has no objection to the employment of Donald Schimizzi in his former or substantially equivalent position of employment with full seniority and other rights and privileges restored as though his employment rights had never been interrupted.

(g) Mail signed copies of the notice to the Regional Director for Region 32 for posting by Harsh Investment Corporation d/b/a The Claremont Resort Hotel and Tennis Club, if willing, at all places where notices to its employees are customarily posted.

[15] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[16] See fn. 15, *supra*.